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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

## No. 62.

NORTHERN NATURAL GAS COMPANY, a Corporation,
*Appellant,*

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
*Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

## APPELLANT'S REPLY BRIEF.

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## APPELLANT'S REPLY BRIEF.

This brief responds to the brief of appellee, The State Corporation Commission of the State of Kansas, the supporting brief of *amici curiae* of the States of Texas, Alabama, Colorado, Georgia, Illinois, Louisiana, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Utah and Wyoming, as well as the supporting brief of the Mid-Continent Oil & Gas Association, to whose motion for leave to file brief *amicus curiae*, Appellant has hitherto objected.

Appellee and *amici curiae* in their respective briefs have, for the apparent purpose of avoiding the legal consequences of this Court's recent decisions construing the Natural Gas Act, attempted, without justifying authority, to reframe appellant's concisely stated question upon which this Court has noted probable jurisdiction. 370 U.S. 901 (Advance Sheet), 8 L. Ed. 399, 82 S. Ct. 1248.

This Court's decisions squarely hold that a state cannot regulate the sale and transportation of natural gas in interstate commerce for resale, because such sale and transportation are subject to the exclusive regulation of the Federal Power Commission under the provisions of the Natural Gas Act. But even if there were no Natural Gas Act, when the purchaser takes (purchases) for interstate transmission, such gas simultaneously "takes-off" in interstate commerce with no local incidences subject to state regulation. See *Michigan-Wisconsin* v. *Calvert*, 347 U.S. 157, 170, 98 L. Ed. 583, 74 S. Ct. 396. Of course, with the passage of the Natural Gas Act, Congress has fully occupied this field of regulation.

**Appellee Misstates the Issue**

As the question presented by appellant in its brief (p. 4) and in its jurisdictional statement (p. 7) clearly stated, the real issue is whether the Orders and Rule here under appeal, which on their face and in their operative effect regulate sales of gas in interstate commerce for resale, are valid in view of the Natural Gas Act and rules and regulations of the Federal Power Commission enacted pursuant thereto. The question is *not*, statements in appellee's briefs and those of *amici curiae* to the contrary notwithstanding, whether the State of Kansas or any state has the power to regulate *production* of natural gas. Appellant does not assert that the State of Kansas has no right under appro-

priate circumstances to restrict production of natural gas to prevent waste and to protect correlative rights. Under the Orders and Rule here on appeal, however, the Kansas Commission has made no attempt to restrict production for such legitimate purposes, but rather has promulgated Orders which regulate sales in interstate commerce and the intended operative effect of which was to force appellant to increase its purchases of gas from the Kansas part of the Hugoton Gas Field. Very briefly, the question raised by appellant and the Federal Power Commission (Rule 40(d)) in these appeals is whether the Kansas Commission can validly enter such Orders and Rule.

Appellee concedes, as it must, that its Order in Case No 42,128 in the Supreme Court of Kansas, is directed specifically against appellant, a natural gas company purchasing natural gas in the Kansas-Hugoton Gas Field for transportation and sale in interstate commerce for resale (Appellee's brief, p. 1), and that its Order and Rule in Case No. 42,127 in the Supreme Court of Kansas is directed against all purchasers of natural gas in each common source of supply in Kansas under proration, which necessarily includes all purchasers of natural gas in the Kansas-Hugoton Field, of which appellant is one. (Appellee's brief, p. 2).

**Appellee Disregards Its Own Basic Proration Order in Effect Since 1944.**

On page 4 of appellee's brief it is said:

> "At the time of the promulgation of the *orders involved in this case*, however, there was no *requirement* in any regulation of the Kansas Commission that the amount of gas produced or taken from any one well bear any relationship to that produced or taken from any other well in the same field." (Emphasis supplied).

The amazing fallacy of appellee's argument becomes clearly manifest when the Court examines the contents of appellee's "Basic Proration Order for the Hugoton Gas Field" (R. 49-66), particularly paragraph *j.* thereof (R. 58) where it is said:

> "The adoption of a formula that will enable each well to currently produce its allowable and ultimately produce approximately the amount of gas underlying the lease upon which it is located is the object sought to be accomplished by this order."

Also note paragraph *m.* thereof (R. 61-62) which reads:

> "That the production of gas in accordance with the above formula has a reasonable relation to prevention of waste, to the prevention of inequitable and unfair production of gas from the common source of supply, and to the prevention of unreasonable discrimination in favor of one producer in said field and against another producer therein *and that production of gas in such manner will in fact accomplish the purposes for which article 7, chapter 55, General Statutes of Kansas for 1935 was enacted.*" (Emphasis supplied) (See G.S., 1961 Supp., 55-703).

For the appellee here to assert that at the time of the promulgation of its purported "Ratable Take Orders" there was *no requirement* in any regulation of the Kansas Commission that *required ratable production by the producer*, or that such Orders and Rule were addressed to the purchasers because that is the *most feasible* method of assuring ratable production and protecting correlative rights (Appellee's brief, pp. 9-10) is clearly erroneous. If, as appellee and the Supreme Court of Kansas assert, the only objective of such orders was the protection of correlative rights and the securing of ratable production of natural gas in the Kansas-Hugoton Field, the Kansas Commission presumably had the authority to order Repub-

lic Natural Gas Company to restrict the production from its wells, under G.S., 1961 Supp., 55-703. As a matter of fact, appellee has in the past exercised such authority and ordered the wells of Republic shut-in for overproduction. See *Republic Natural Gas Co.* v. *State Corporation Commission*, (1952) 173 Kan. 172, 175, 244 P.2d 1196.

**Kansas Commission's Objective Illegal.**

The mandate of the statute G.S., 1961 Supp., 55-703, in effect at the time of the adoption of such purported "Ratable Take Orders," was to *limit the production of gas* for the purpose of conserving the same, preventing the waste thereof, and protecting the correlative rights of producers therein *in order to satisfy the market requirements* for gas from the common source of supply under appellee's jurisdiction. This is a legitimate state objective. This objective is clearly made manifest by the plain language of the statute itself, else the Legislature would not have stated in said statute, after reciting that whenever the Kansas Commission found and determined that its jurisdiction should be exercised thereunder,

> "* * * then any person, firm or corporation having the *right to produce natural gas therefrom, may produce only such portion of all of the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof.*" (Emphasis supplied).

However the appellee in promulgating its purported "Ratable Take Orders" has departed from such legitimate

state objective. The intended operative effect of the Orders and Rule upon the appellant's interstate operation in the Kansas-Hugoton Field is clearly pointed up in the *amicus curiae* memorandum for the Federal Power Commission. That memorandum definitely shows that these actions of the appellee exert leverage on interstate pipelines to purchase natural gas from one state rather than another.

On pages 25-30 of the Federal Power Commission memorandum, which portion thereof is made a part of this brief by reference to avoid duplication, the practical consequences of the purported "Ratable Take Orders" of the Kansas Commission here in question are accurately measured. Appellant is in full accord with this stated position of the Federal Power Commission as applied to the facts of this case, all of which is fully discussed in appellant's brief.

The operative effect of appellee's purported "Ratable Take Orders" becomes more pronounced and easier understood when it is considered that the "common source of supply of natural gas" dominant in the jurisdictional mind of appellee at the time of the issuance of its said Orders was the tri-state "*Hugoton Gas Field.*" When one examines carefully the respective briefs of appellee and those of its supporting *amici curiae*, it is often difficult to decipher in many places therein whether the reference is intended to the "Hugoton Gas Field" *in toto*, or only that part which is located in Kansas. The "Hugoton Gas Field" is a single inter-connected tri-state common source of supply, while the "Kansas-Hugoton Gas Field", as a common source of supply, is defined by Kansas law, G.S. 1949, 55-702, and appellee's Rule 82-2-201, as

> "* * * each geographic area or horizon, *or portion thereof lying within the state of Kansas*, which is definitely separated from any other such area or horizon and which contains, or from competent evidence ap-

> pears to contain, a common accumulation of gas." (Emphasis supplied).

In this connection appellee and the Supreme Court of Kansas prior to this case confined its jurisdiction, as it should, exclusively to that portion of the Hugoton Field lying within the boundaries of Kansas. In appellee's first price-fixing case, *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 724, 222 P.2d 704, the Supreme Court of Kansas said:

> "We are concerned here with *only* that part of the Hugoton gas field which is in Kansas." (Emphasis supplied).

When this Court examines the brief of *amici curiae* of the States of Texas *et al.* (p. 6), and that of the Mid-Continent Oil and Gas Association attached to its motion for leave to file brief *amicus curiae* (p. 6), it becomes crystal clear that such briefs construe the purpose of the purported "Ratable Take Orders and Rule" here in question, to include not only the protection of correlative rights of Kansas producers, but also to secure for them their "fair share" of the total market requirements of the respective pipeline companies purchasing gas from the entire tri-state "Hugoton Gas Field." The Supreme Court of Kansas, in its opinion denying rehearing in this case (R. 189), puts it in slightly different language by saying,

> "Thus, in 1958, the Commission may have been, in a roundabout way, endeavoring to set up *ratable taking as between Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells.*" (Emphasis supplied).

The Federal Power Commission (Brief, pp. 8-9) quotes freely from the concurring opinion of then Chairman Beatty of the Kansas Commission which clearly shows that the dedicated purpose of the Kansas Commission was to force

higher takes (purchases) of gas from the Kansas-Hugoton Field, in order that that field may receive what the Kansas Commission believes to be that field's "fair share" of the respective pipeline companies interstate markets. See also, appellant's brief, pp. 31-32, n. 6, for citation of reaffirmation of such policy by Commissioner (now Chairman) Byrd of the present Kansas Commission.

On pages 12 and 34-35 of appellee's brief it takes the position that the "motive" of the Kansas Commission in issuing its orders "to exert leverage on interstate pipeline companies, to increase their take from the Kansas wells" is irrelevant, and cites in support thereof the case of *Stephenson* v. *Binford*, 287 U.S. 251, 276, 77 L. Ed. 288, 53 S. Ct. 181, and other cases. Neither the *Stephenson* case nor the other cases cited by appellee deal with a factual situation where the Congress of the United States has entered and occupied the particular field of regulation attempted to be covered by Kansas in this case, i. e., the sale and transportation of natural gas in interstate commerce for resale and natural gas companies engaged in such sale and transportation. Exercise of a power within the realm of state interest is insulated from judicial review but such insulation is *not* "carried over" when that power is used to circumvent a federally protected right. See *Gomillion* v. *Lightfoot*, (1960) 364 U.S. 339, 347, 5 L. Ed. 2d 110, 117, 81 S. Ct. 125.

On page 27 of its brief, appellee takes the further position, citing purported authority of this Court therefor, to the effect that the Kansas orders are valid, even if it is assumed that compliance with the orders may require appellant rather than ultimate consumers to pay for gas not taken under the Republic "A" contract initially made in 1930. In making this statement appellee recognizes the unlawful operative effect of its Orders and Rule upon appel-

lant's interstate operations. Finally the position is taken, not only by appellee (p. 10 of its brief) but by supporting briefs as well (p. 16 Mid-Continent brief and pp. 14-15 Texas *et al.* brief), that if Kansas and other oil and gas producing states are to effectively regulate production, they must also have the authority to require purchasers of gas to take proportionately from all wells to which they may be connected in a common source of supply, even though the exercise of such authority by the states may *affect* sales of gas in interstate commerce for resale. Apparently the Supreme Court of Kansas too favors this position. *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. 355, 359, 362 P.2d 599.

The short answer to these contentions may be found in the Supremacy Clause of the Federal Constitution, Article VI, Clause 2; in the decisions of this Court construing such Supremacy Clause and the provisions of the Natural Gas Act; and, in the admissions of the appellee in its brief.

**Under Supremacy Clause Natural Gas Act Controls.**

The Supremacy Clause of the Federal Constitution, as this Court well understands, in substance provides that when Congress by statute has entered and occupied a particular field, such as regulation of the sale and transportation of natural gas in interstate commerce for resale and natural gas companies engaged in such business, that law is supreme, and the regulating power of the State ceases to exist. *Erie R. Co.* v. *New York*, 233 U.S. 671, 681, 58 L. Ed. 1149, 34 S. Ct. 756. See also, *Free* v. *Bland*, 369 U.S. 663, 666 (Advance Sheet), 8 L. Ed. 2d 180, 183, 82 S. Ct. 1092, 1093.

With respect to the Natural Gas Act and the jurisdiction of the Federal Power Commission thereunder concern-

ing the sale and transportation of natural gas in interstate commerce for resale, this Court made it very plain in *Natural Gas Pipe Line Co.* v. *Panoma Corp.*, 349 U.S. 44, 45, 99 L. Ed. 866, 75 S. Ct. 576, that:

> "* * * such a sale and transportation cannot be *regulated* by a state but are subject to the *exclusive regulation* of the Federal Power Commission." (Emphasis supplied).

Again in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381, and *Phillips Petroleum Co.* v. *Corporation Commission of the State of Oklahoma*, 355 U.S. 425, 2 L. Ed. 2d 412, 78 S. Ct. 409, 410, this Court reaffirmed its ruling that the regulation of such a sale and transportation as here involved are exclusively within the jurisdiction of the Federal Power Commission and a state is prohibited from regulating any aspect thereof.

**Appellee Concedes Invalidity of Its Orders.**

It is plain from the language used in appellee's brief (pp. 11-12) that it concedes the Federal Power Commission under the provisions of the Natural Gas Act "retains plenary authority to prevent, if it sees fit, the very consequences that are said to invalidate the Kansas orders." It points out that the Federal Power Commission also asserts authority to "modify or cancel take or pay provisions in proceedings under Section 5 of the Natural Gas Act, and to deal with such provisions in Section 4 or Section 7 proceedings." Appellee thus concedes, as it must, the manifest jurisdiction of the Federal Power Commission over the very function (sale) it seeks here to regulate. The sale of natural gas in interstate commerce for resale cannot be controlled by two masters where the jurisdiction of one is exclusive. Where Congress has entered the field of

such regulation, certainly the states cannot act with respect to any aspect thereof occupied by the Federal authority. In other words, the power of state regulation ceases to exist.

On page 10 of appellee's brief, it asserts:

> "The two Kansas orders do not conflict with or impair the authority of the Federal Power Commission *to fix prices* for gas sold in interstate commerce for resale, *to control the terms and conditions of such sales,* to grant certificates of convenience and necessity for the interstate transportation or sale of natural gas, *or to exercise any of the other powers conferred upon the Commission by the Natural Gas Act.*" (Emphasis supplied).

Since the purported "Ratable Take Orders" are directed to the sale rather than to production, the operative effect thereof intended under the circumstances here involved is to compel appellant to purchase and pay for more gas than is needed to supply its market from the Kansas Hugoton Field, with the consequence of increasing appellant's gas costs. (Compare Memorandum for Federal Power Commission, pp. 25-30.) That the Kansas Commission cannot directly fix the price for gas sold in interstate commerce for resale has already been definitely settled by this Court. What such Kansas Commission cannot do directly, it cannot do indirectly. For appellee to assert that these orders here in question do not conflict with or impair the authority of the Federal Power Commission, or control the terms and conditions of the sale of gas in interstate commerce for resale, or interfere with the exercise of other powers conferred upon the Federal Power Commission by the Natural Gas Act *controverts its own admissions as set forth above.*

**Federal Regulation of Interstate Sales of Gas Exclusive.**

Appellee attaches no significance to the words "regulate" or "exclusive regulation" as used by this Court in *Natural Gas Pipeline Co.* v. *Panoma Corp., supra,* and as defined by this Court long ago in *Dayton-Goose Creek R. Co.* v. *United States,* 263 U.S. 456, 478, 68 L. Ed. 388, 398, 44 S. Ct. 169. (See appellant's jurisdictional statement, pp. 19-20 for quote defining the word "regulate"). See also *North American Co.* v. *Securities & Exch. Com.,* 327 U.S. 686, 704, 90 L. Ed. 945, 66 S. Ct. 784, where it is said:

> "For nearly one hundred and twenty-five years, this Court has recognized that the power of Congress over interstate commerce is 'the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' Gibbons v. Ogden, supra (9 Wheat. (U.S.) 196, 6 L. Ed. 70)."

It is clearly untenable in the face of these authorities for appellee to contend that this Court's decisions construing the Natural Gas Act *limit the jurisdiction* of the Federal Power Commission *merely to the regulation of the price of natural gas sold in interstate commerce for resale.* Certainly such a view does not conform either to the intent of Congress or the plain language used by this Court in its decisions.

For this Court to hold that the State of Kansas by these purported "Ratable Take Orders" *can affect even to a limited extent the jurisdiction of the Federal Power Commission to regulate the sale and transportation of natural gas in interstate commerce for resale in this tri-state gas field, would open the door for Oklahoma and Texas as well as every other gas producing state to attempt to do*

*likewise. The so-called "incidental" effect upon federal jurisdiction* (particularly when such federal jurisdiction is exclusive) *would then be compounded and the competitive race between the states* (under the guise of regulating production) *would be in full swing—analogous to the competitive race between Oklahoma and Kansas, nullified by this Court, when such states attempted successively to "jack up" the price of natural gas flowing uninterruptedly from this same common source of supply to the interstate markets of the respective pipeline companies.*[1]

In commenting on the position taken in the memorandum filed herein for the Federal Power Commission that the judgments herein should be vacated and these appeals remanded to the Supreme Court of Kansas for determination by that court as to whether the Orders and Rule here under appeal acted so as to remove from the Republic "A" contract the minimum take obligations therein contained, appellant would observe that if this Court should be of the view that the validity of the Kansas Orders and Rule depends thereon, then appellant concurs in the position of the Federal Power Commission that the judgments appealed from be vacated and the case remanded to the Supreme Court of Kansas for determination of that Court in this case of that specific question.

As clearly heretofore pointed out in this brief such Orders and Rule regulating the taking of gas (purchase and transportation for resale in interstate commerce) is a matter *exclusively* under the control of the Federal Power Commission under the provisions of the Natural Gas Act.

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1. Compare *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229, 55 L. Ed. 716, 31 S. Ct. 564; *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 67 L. Ed. 1117, 43 S. Ct. 658; *Michigan-Wisconsin P. L. Co.* v. *Calvert*, 347 U.S. 157, 170, 98 L. Ed. 583, 593-594, 74 S. Ct. 396.

Appellant, therefore, submits that the importance of the real question here presented is so much in the public interest and of concern to the industry and the states, that it requires an immediate solution by this Court.

## CONCLUSION.

Based upon the record before this Court and the arguments and authorities cited in appellant's briefs, supplemented by the Federal Power Commission's memoranda, it is asserted by appellant that in this interstate common source of supply of natural gas (the Hugoton Gas Field) the Kansas Commission by its purported "Ratable Take Orders and Rule" has unlawfully attempted to extrapolate its authority and jurisdiction to regulate the sale and transportation of natural gas in interstate commerce for resale and to natural gas companies engaged in such sale and transportation, all of which matters are within the *exclusive* jurisdiction of the Federal Power Commission, and by reason thereof the respective judgments of the Supreme Court of Kansas sustaining such Orders and Rule should be reversed.

Respectfully submitted,

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